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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SANDEE HWANG, Plaintiff and Respondent, v. FRANK CHU, Defendant and Appellant.	E063659 (Super.Ct.No. CIVRS1400359) OPINION

APPEAL from the Superior Court of San Bernardino County. Joseph R. Brisco, Judge. Affirmed; motion for sanctions denied.

Kenny Tan, Adam Hussein, and Tiffany E. Garrick for Defendant and Appellant.

Garrett & Tully, Ryan C. Squire, and Zi C. Lin; Manion Gaynor & Manning and David Davidson for Plaintiff and Respondent.

Plaintiff Sandee Hwang brought this quiet title action against defendants Linger Chu and Frank Chu. Frank Chu did not respond to the complaint, so Hwang took his default. Hwang then filed a motion to enter judgment against both Linger Chu and Frank

Chu, based on a settlement agreement signed by both of them. The trial court granted the motion.

Not quite six months later, Frank Chu moved to set aside the default and the judgment, claiming that he was never properly served. The trial court denied the motion.

Frank Chu appeals from the denial of his motion to set aside, contending:

1. The evidence demonstrated that he was not properly served.

2. The motion to set aside was not untimely.

In response, Hwang disputes these contentions and also contends that even if Frank Chu was not properly served, the judgment was valid because he stipulated to it.

We will hold that the trial court erred by finding, based on supposed "contradictions" in the evidence, that Frank Chu failed to carry his burden of proving lack of proper service. We will further hold that the judgment was not necessarily valid just because it was based on a settlement agreement. Finally, however, we will hold that the trial court had to deny the motion because it was not shown to be timely.

I

PROCEDURAL BACKGROUND

In January 2014, Hwang filed this action against Linger Chu and Frank Chu. The complaint has not been included in the appellate record, but both sides agree that it sought to quiet title.

In February 2014, at Hwang's request, the trial court entered Frank Chu's default based on a proof of service which showed that the summons and complaint had been

emailed to "Jeffrey Coleman, Esq., attorney for defendant Frank Chu," and that Coleman had signed an acknowledgement of service on Frank Chu's behalf.

In July 2014, Linger Chu answered the complaint.

In September 2014, Hwang filed a motion to enforce a settlement agreement under Code of Civil Procedure section 664.6. The motion was based on a written settlement agreement signed by both Linger Chu and Frank Chu. In the motion, Hwang requested the "[e]ntry of a stipulated judgment against Mr. Frank Chu and Ms. Linger Chu" pursuant to the settlement agreement. The trial court ordered the motion heard on shortened time.

Linger Chu filed an opposition to the motion. In it, she claimed that she signed the settlement agreement so that her attorney could send it to Hwang, as an offer to settle; Hwang, however, did not accept the offer within a reasonable time. Nevertheless, in October 2014, the trial court granted the motion to enforce the settlement agreement. It therefore entered judgment against both Linger Chu and Frank Chu.[1]

In March 2015, Frank Chu filed a motion to set aside his default and the "default judgment." He argued that the purported service on him was invalid, because Coleman had not been authorized to accept service on his behalf.

In her opposition, Hwang argued that: (1) the motion was untimely; (2) Coleman had in fact been authorized to accept service on Frank Chu's behalf; and (3) even

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[1] Linger Chu appealed from the judgment. We affirmed. (*Hwang v. Chu* (Mar. 10, 2016, E062494) [nonpub. opn].)

assuming the service was invalid, the trial court had jurisdiction over Frank Chu based on the settlement agreement.

In May 2015, the trial court denied the motion.

II

SERVICE OF PROCESS

Frank Chu contends that the trial court erred by finding insufficient evidence that the service was invalid.

A. *Additional Factual and Procedural Background*.

The following facts are taken from the evidence introduced in support of and in opposition to the motion to set aside.

Frank Chu testified: "My wife, Linger Chu, and son, Alex Chu, had communications with Jeffrey Coleman for him to represent Linger Chu and I [*sic*] in this action. I never had any communications with Mr. Coleman. [¶] . . . I never authorized Mr. Coleman, or anyone else, to accept service of the summons and complaint in this action on my behalf."

Somewhat unusually, Coleman submitted two declarations — one in support and one in opposition.

In his declaration in support of the motion, Coleman testified: "In the second[ ]half of January 2014 through mid-February 2014, I had discussion [*sic*] with Linger Chu and Alex Chu to represent Defendants as counsel of record in this action. . . . On or about February 12, 2014, it was decided I would not represent Defendants in any capacity

. . . . From the second[-]half of January 2014 through mid-February 2014 I don't recall having any direct communications with Frank Chu."

In his declaration in opposition to the motion, Coleman testified that Hwang's attorney "requested that I agree to accept service of the summons and complaint on behalf of Frank Chu and Linger Chu . . . . I informed [him] that I would need to receive authorization to accept service on their behalf and that I would get back to him on this issue."

"On or about January 22, 2014, I informed [Hwang's attorney] . . . that I requested authorization to accept service of the summons and complaint . . . ."

"On or about January 23, 2014, I informed [Hwang's attorney] that I received authority to accept service of the summons and complaint . . . ."

"On January 24, 2014, I signed the notice of acknowledgement for Frank Chu and delivered it via email to [Hwang's attorney]."

Hwang's attorney testified that on January 27 and 28, 2014, Coleman referred to the "claims by [his] clients" and said that he was going to "meet with [his] clients."

B. *Additional Procedural Background*.

The trial court ruled: "Mr. Coleman states in one declaration that he doesn't recall having any direct communication with Frank Chu. However, in another declaration Mr. Coleman states that he did receive authorization to accept se[r]vice and signed the Notice of Acknowledgement and Receipt on behalf of Frank Chu. These contradictions, coupled with the fact that [Frank Chu] later signed a settlement agreement, which called

for the entry of a stipulated judgment against him, fail[] to convince the court that the service of the Summons and Complaint w[a]s invalid."

B. *Discussion*.

The trial court applied an incorrect legal standard. "[A]gency cannot be proved by the out-of-court declarations of the agent." (*Tri-Cor, Inc. v. City of Hawthorne* (1970) 8 Cal.App.3d 134, 139.) Thus, the fact that Coleman referred to his "clients," the fact that he said that he was authorized to accept service, and the fact that he signed the notice of acknowledgement cannot be used to prove that he was authorized.

The trial court viewed these facts as "contradict[ing]" Coleman's testimony that he did not remember communicating with Frank Chu. Pragmatically, it does seem fishy that a member of the bar would accept service for a purported client unless he has reason to think that the client has, in fact, authorized him to do so. Nevertheless, the legal rule is that an agent's out-of-court *conduct* — just like the agent's out-of-court *statements* — is inadmissible to prove agency. (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734.)

According to the trial court, "in a[] declaration, Mr. Coleman states that he did receive authorization to accept se[r]vice . . . ." Unlike an agent's out-of-court statements, an agent's in-court testimony is admissible to prove agency. (*Zander v. Casualty Ins. Co. of Cal.* (1968) 259 Cal.App.2d 793, 800-801.) However, the trial court misremembered Coleman's testimony. Actually, Coleman stated that he *told Hwang's attorney* that he

had received an authorization to accept service. He carefully avoided saying whether this was true. Thus, again, the trial court improperly relied on an out-of-court statement.

"An abuse of discretion . . . occurs if the court applies an erroneous legal standard . . . . [Citations.]" (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 110.) Hwang argues that there was substantial evidence that Coleman was authorized to accept service on behalf of Frank Chu; she does not claim, however, that this evidence was overwhelming or that such a finding was compelled. Ordinarily, then, we would remand with directions to reconsider the motion. (See *In re Charlisse C.* (2008) 45 Cal.4th 145, 167 and cases cited.) We need not remand, however, if we can affirm on other grounds. Accordingly, we turn to the parties' other contentions.

III

THE EFFECT OF THE SETTLEMENT AGREEMENT

Hwang contends that, even assuming Frank Chu was not properly served, the judgment was valid because he stipulated to it.

"A general appearance by a party is equivalent to personal service of summons on such party." (Code Civ. Proc., § 410.50, subd. (a).) However, merely entering into an out-of-court settlement agreement is not a general appearance. The settlement agreement did not have a caption. It was not a stipulation for the entry of judgment. It could not be filed all by itself; it could not be turned into a judgment without some further action by one or both parties.

There is some authority to the effect that a stipulation for judgment constitutes a general appearance; thus, a plaintiff can obtain a judgment by stipulation, even though the defendant has not been served. (*Title Guarantee & Trust Co. v. Griset* (1922) 189 Cal. 382, 390; *Cooper v. Gordon* (1899) 125 Cal. 296, 301; *Foote v. Richmond* (1871) 42 Cal. 439, 443; *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1270-1271.)

In these cases, however, it does not appear that the defendant's default had been entered. It is axiomatic that "[o]nce default is entered by the clerk, defendant's right to appear in the action thereafter is cut off." (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 5:116, p. 5-39.) Accordingly, even if the settlement agreement could have constituted a general appearance before default was entered, it could not do so afterward.

Hwang cannot have it both ways. If the settlement agreement constituted a general appearance, then Frank Chu became entitled to notice of all further proceedings. If it did not constitute a general appearance, then she did not have to give him notice, but he could still claim that the judgment was void because he was never properly served.

The public policy in favor of settlement suggests that a plaintiff and a defaulted defendant should be able to enter into an enforceable settlement agreement. However, due process suggests that the defaulted defendant should have notice and an opportunity to be heard before an alleged settlement agreement is enforced. Here, for example, Linger Chu claimed that the settlement agreement never went into effect because Hwang did not accept it within a reasonable time. While the trial court rejected that claim, and

we rejected it again on appeal, it illustrates the need to give Frank Chu — or any other defendant in his position — the opportunity to raise any defenses that may exist to the enforcement of an alleged settlement agreement.

A plaintiff could obtain a judgment against a defaulted defendant based on a settlement agreement without giving notice, but only if it is effectively a default judgment. First, there would have to be a prove-up hearing. (Code Civ. Proc., § 585, subd. (b).) The evidence could consist solely of the settlement agreement — i.e., the defaulted defendant's admission that the plaintiff is entitled to the relief set forth in the settlement agreement. Admittedly, in this case, the motion to enforce the settlement agreement served much the same purpose. Second, the relief set forth in the settlement agreement could not exceed the relief sought in the complaint. (Code Civ. Proc., § 580, subd. (a).) Because the complaint is not in the appellate record, we do not know whether that is the situation here. However, a judgment based on the settlement agreement would still be a default judgment; even assuming both prerequisites were satisfied, if the underlying default was void for lack of service, the judgment would be void.

Finally, Hwang also contends that the judgment was a stipulated judgment rather than a default judgment, and therefore it could be challenged only by appeal. Code of Civil Procedure section 473, subdivision (d) does not draw such a distinction. It allows the trial court to set aside "*any* void judgment . . . ." (Italics added.) Hwang points out that the judgment was final and appealable; but a default judgment is also final and

appealable (*Thomas v. Luong* (1986) 187 Cal.App.3d 76, 78), yet it can still be set aside under Code of Civil Procedure section 473, subdivision (d).

We conclude that, because Hwang did nothing to reopen the default, the judgment against Frank Chu remained subject to attack based on lack of proper service, even though it was based on a settlement agreement.

IV

TIMELINESS

Frank Chu contends that his motion to set aside the judgment was not untimely. The trial court, of course, denied the motion on the merits, not based on timeliness. Hwang, however, contends that the motion was untimely and therefore had to be denied in any event.

"Different time limits apply depending upon the ground asserted for relief from default . . . ." (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 5:278, p. 5-72.)

A defendant can move for relief from default under Code of Civil Procedure section 473.5, on the ground that "service of a summons has not resulted in actual notice to a party in time to defend the action . . . ." (Code Civ. Proc., § 473.5, subd. (a).) In that event, the defendant must bring the motion "within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or

default judgment has been entered." (*Ibid*.) Frank Chu did not move for relief on this ground.

A defendant can also move for relief from default under Code of Civil Procedure section 473, subdivision (d), on the ground that the default is void. Code of Civil Procedure section 473, subdivision (d) "contains no express limitation period . . . ." (*Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121.) "A judgment that is void on its face may be set aside at any time. [Citation.]" (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42.) However, "[w]here a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5 . . . . [Citations.]" (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180.) This includes the two-year outer time limit. (*Ibid*.) It also includes the "reasonable time" limit. (*Schenkel v. Resnik* (1994) 27 Cal.App.4th Supp. 1, 3-4.) Presumably, then, it also includes the limit of 180 days after service of notice of entry.

Here, the motion was brought less than six months after entry of the default judgment, so it was not barred by the two-year time limit.

The motion also was not barred by the 180-day time limit. As required by Code of Civil Procedure section 587, the request for entry of default included a declaration that the request had been mailed to Frank Chu. However, precisely because the request had to be mailed *before* the default could be entered, it was not "written notice that the default

. . . *has been entered*" within the meaning of Code of Civil Procedure section 473.5, subdivision (a).

This brings us to the 'reasonable time" limit. Hwang argues that the motion was not filed within a reasonable time, for two reasons.

First, she argues the motion was not filed within a reasonable time as a matter of law. She claims that a "reasonable time" is limited to six months after discovery of the default. She cites *Schenkel v. Resnik*, *supra*, 27 Cal.App.4th Supp. 1, but *Schenkel* does not support her position. Code of Civil Procedure section 473.5, as discussed, has both a reasonable time requirement and an outside limit of two years. Code of Civil Procedure section 473, subdivision (b) — dealing with relief from default based on mistake, inadvertence, surprise, or excusable neglect — has both a reasonable time requirement and an outside limit of six months. *Schenkel* held that a "reasonable time" as used in Code of Civil Procedure section 473.5 means the same thing as a "reasonable time" as used in Code of Civil Procedure section 473, subdivision (b); that is, they require "both '"'a satisfactory excuse for [the] default, and . . . *diligence* in making the motion after discovery of the default." [Citation.]' [Citation.]" (*Schenkel*, *supra*, at p. 4.) However, it did not hold that Code of Civil Procedure section 473.5 somehow incorporates the six-month outside limit of Code of Civil Procedure section 473, subdivision (b). As noted, Code of Civil Procedure section 473.5 has its own outside time limit, which is measured from written notice of entry, not from discovery of the default.

Second, Hwang also argues, more broadly, that Frank Chu failed to prove that he brought the motion within a reasonable time. As to this, we agree.

As already mentioned, "a '"moving party . . . must show *diligence* in making the motion after discovery of the default."' [Citations.]" (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1145.) Frank Chu did not testify to when he discovered the default. From the mailing of the request for entry of default, it is fairly inferable that he learned of it almost immediately after it was entered. In addition, Hwang submitted evidence that:

1. In June 2014, Linger Chu and Frank Chu signed and served separate substitutions of attorney designating one Justin Shrenger as their attorney of record.[2]

2. In July 2014, Schrenger asked Hwang's counsel to stipulate to set aside the default.

Again, it is fairly inferable that, since Frank Chu's personally designated counsel knew about the default, Frank Chu did, too. Indeed, it is at least arguable that his counsel's knowledge must be imputed to him. (*Strong v. Sutter County Board of Supervisors* (2010) 188 Cal.App.4th 482, 498.)

A fortiori, Frank Chu did not explain his delay of nearly six months in filing the motion for relief from default. Far shorter delays have been held to be unreasonable when there was no satisfactory explanation for them. (*Younessi v. Woolf*, *supra*, 244

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[2] Frank Chu's substitution of attorney was never filed with the trial court.

Cal.App.4th at p. 1145 [seven weeks]; *Mercantile Collection Bureau v. Pinheiro* (1948) 84 Cal.App.2d 606, 607-609 [two months].)

Ordinarily, the determination of whether a motion for relief from default has been brought within a reasonable time "is wholly within the court's discretion. [Citations.]" (*Davis v. Davis* (1960) 185 Cal.App.2d 788, 792.) Here, however, because Frank Chu failed to introduce any evidence whatsoever that he brought the motion in a reasonable time, it would have been an abuse of discretion to grant the motion. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 532.)

We therefore conclude that the motion was properly denied.

V

WHETHER THE JUDGMENT WAS VOID ON ITS FACE

At oral argument, counsel for Frank Chu argued for the first time that the judgment is void on its face. As noted in part IV, *ante*, if the judgment was void on its face, then the motion to set it aside was not subject to any time limit.

Ordinarily, we would deem this contention forfeited because it was not raised below. Indeed, we would deem it doubly forfeited because it also was not raised in the briefs. However, we repeat that a judgment void on its face may be set aside *at any time*. Even assuming Frank Chu has forfeited this contention for purposes of this appeal, on remand he could file a new motion to set aside the judgment. He could even file an independent action in equity to set it aside. (See generally *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667-670.) Thus, we would reach the issue in any event to preempt any

such protracted proceedings. (Cf. *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2 [reaching forfeited issue to forestall future habeas petition based on ineffective assistance of counsel].)

"[J]urisdictional errors can be of two types. A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable. [Citations.]" (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) "The court having acquired jurisdiction of the subject-matter and of the parties, its judgment is not void for the mere erroneous decision on a question of law . . . . A judgment is never absolutely void if the court had jurisdiction of the subject-matter and the person of the defendant no matter how erroneous it may be. [Citations.]" (*Gray v. Hall* (1928) 203 Cal. 306, 314.)

"'"A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll." [Citation.]' [Citation.]" (*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1440.)

Frank Chu asserted that the judgment is void on its face for two different reasons. We will discuss these in turn.

First, he argued that the proof of service shows that Coleman was served by email, which is not a valid method of service.

Code of Civil Procedure section 415.30 states that service can be made by mail, provided the summons and complaint are accompanied by a notice of acknowledgment of

service and a prepaid return envelope, and provided the person to be served signs and returns the notice of acknowledgment of service.

When a defendant has failed to answer the complaint, the judgment roll includes the proof of service on that defendant. (Code Civ. Proc., §§ 415.30, 670, subds. (a), (b).)

Here, the proof of service recited that Coleman was served by mail. However, the box indicating that the items served included a notice of acknowledgment of service and a prepaid return envelope was not checked. Instead, the proof of service stated that service was effected "[b]y correspondence with defendant[']s counsel . . . [a] copy of which is attached as Exhibit A." Exhibit A was a printout of a series of emails between Hwang's counsel and Coleman. It showed that Coleman agreed to accept service for Frank Chu. Hwang's counsel then emailed the summons, complaint, and notice of acknowledgment of service to him. Finally, he signed and returned the notice of acknowledgment of service (a copy of which was included).

Boiled down, then, Frank Chu's position is that a signed acknowledgment of service is ineffective unless the summons, complaint, and acknowledgment were properly served by mail in accordance with all of the requirements of Code of Civil Procedure section 415.30. We disagree. To the contrary, signing and returning an acknowledgment of service *waives* any defects in the service. The form acknowledgement states, "If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below." (Judicial Council form POS-015.) By signing and returning this, Coleman admitted on Frank Chu's behalf that service was

complete. (*Smith v. Moore Mill & Lumber Co.* (1929) 101 Cal.App. 492, 495 ["[I]f the acknowledgment is so worded as to evidence an intention to waive further service, it partakes of the nature of a waiver and is legally sufficient to confer jurisdiction over the person of the defendant . . . ."].)

Of course, Frank Chu claims that Coleman was not authorized to accept service on his behalf. However, his testimony that Coleman was unauthorized is not part of the judgment roll. (*Johnson v. Hayes Cal Builders, Inc.* (1963) 60 Cal.2d 572, 576 [motions are not part of the judgment roll].) The proof of service, which *is* part of the judgment roll, shows that Coleman purported to represent him. """[I]t is always presumed, until the contrary appears, that an attorney is duly authorized to appear for and represent any parties for whom he assumes to act."' [Citations.]" (*Hearn Pacific Corporation v. Second Generation Roofing Inc.* (2016) 247 Cal.App.4th 117, 139, fn. 17.)[3] Thus, from the face of the judgment roll alone, it would appear that Coleman was duly authorized.

Second, Frank Chu argued that the trial court cannot enter a default judgment in a quiet title action. However, a default judgment in a quiet title action, while erroneous, is not void on its face. (*Yeung v. Soos* (2004) 119 Cal.App.4th 576, 582.)

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[3] This is not inconsistent with our holding that agency cannot be proved by the out-of-court declarations of the agent. (See part II.B, *ante*.) Coleman's claim that he was authorized to accept service for Frank Chu was not *evidence* that he was, in fact, authorized. Rather, it gave rise to a *presumption* that he was authorized, which shifted the burden of disproving authorization to Frank Chu. (Evid. Code, § 600, subd. (a) ["A presumption is not evidence."]; see Evid. Code, §§ 604, 606.)

Code of Civil Procedure section 764.010 provides that, in a quiet title action: "The court shall examine into and determine the plaintiff's title against the claims of all the defendants. The court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law."

Code of Civil Procedure section 764.010 "does not preclude entry of a defendant's default. [Citations.] . . . [¶] [It] does require, however, an evidentiary hearing in a quiet title action after default. In quiet title actions, default proceedings must be conducted by means of evidentiary hearings. [Citation.] . . . [J]udgment may not be entered by the normal default prove-up methods; the court must require evidence of the plaintiff's title. [Citation.]" (*Yeung v. Soos*, *supra*, 119 Cal.App.4th at p. 581, fn. omitted; see also *Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 947 ["notwithstanding a defendant's default in a quiet title action, the plaintiff is not automatically entitled to judgment in its favor but must prove its case in an evidentiary hearing with live witnesses and any other admissible evidence"].)

Thus, if the trial court in a quiet title action errs by holding a default prove-up rather than a full evidentiary hearing, "the improper procedure does not deprive the trial court of the power to enter the judgment. The procedure is merely erroneous. The

judgment is not void on this ground. [Citation.]" (*Yeung v. Soos, supra*, 119 Cal.App.4th at p. 582.)

We therefore conclude that Frank Chu has not shown that the judgment is void on its face. Hence, he is subject to the time limits applicable to a motion to set aside a judgment valid on its face.

VI

MOTION FOR SANCTIONS

Hwang has filed a motion for frivolous appeal sanctions.

"'"[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit."' [Citation.]" (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1513.)

"'[A]ny definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals.' [Citation.] Moreover, 'the punishment should be used most sparingly to deter only the most egregious conduct.' [Citation.]" (*Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, 756.)

Hwang argues that this is, in effect, a prohibited appeal from a stipulated judgment. Not so. Frank Chu is not appealing from the judgment; he is appealing from the order denying his motion to set aside the judgment, which raises distinct issues.

We have agreed with Frank Chu's position on two out of the three issues. While we have rejected his position regarding the timeliness of the motion to set aside, we cannot say it was so totally and completely devoid of merit as to be frivolous. Indeed, Hwang's motion for sanctions does not argue that it was. We therefore deny the motion.

VI

DISPOSITION

The order appealed from is affirmed. Hwang is awarded costs on appeal against Frank Chu.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.